Tan Khoon Eng v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO KG 7 OF 1989
CHONG SIEW FAI J
14 MAY 1991

Customs and Excise *— Import declaration — Incorrect particulars stated therein — Essence of charge — Proof of offence — Invoking presumption of nature, quality and quantity of goods seized — Customs Act 1967 ss 120 & 133(1)(a)*

Evidence *— Admissibility — Report of customs officer who examined goods and calculated duty chargeable — Authorship of report proved — Whether report admissible*

The accused was convicted of the offence of signing a customs import declaration containing incorrect particulars in that the declaration stated 21 tons of flooring tiles when in fact there were 29.7 tons. The accused appealed, inter alia, against the conviction. The accused contended that the report of the customs officer ('the exhibit') who examined the goods and calculated the duty had been improperly admitted. He further contended that there was no evidence to support the value of the goods as stated in the charge and that the presumption of the quantity of the goods in s 120 of the Customs Act 1967 ('the Act') had not been invoked. The prosecution appealed against sentence.

Held, dismissing the appeals:

(1) The examination of the goods had been carried out by PW10 who himself had prepared the exhibit in question. The authorship was proved, and the document was admissible.

(2) The essence of the charge was the weight of the goods. The offence was committed upon proof of the particulars being incorrectly declared. The evidence adduced conclusively proved that the weight as declared was incorrect.

(3) To invoke the presumption under s 120 of the Act, it was sufficient to examine and if necessary test the contents of 10% only of each description of package or receptacle in which the goods were contained. In the context of the present case, the phrase 'each description of package or receptacle' was a carton. The evidence adduced showed that there were 1,000 cartons, all of standard packing. The evidence also showed that the customs officials had tested the whole contents of 12 cartons and not just the contents of 10% of each of the 12 cartons. It was clear that the requirement needed to invoke the presumption under s 120 of the Act had been complied with.

(4) On the facts and circumstances, the court was unable to find that the trial magistrate had wrongly exercised her discretion in sentencing the accused.

A **[Bahasa Malaysia summary**

Si tertuduh telah disabitkan bersalah kerana kesalahan menandatangani satu pengakuan import kastam yang mengandungi butir-butir yang salah kerana pengakuan itu menyatakan 21 tan jubin lantai sedangkan sebenarnya terdapat 29.7 tan. Si tertuduh membuat rayuan, antara
B lain, terhadap sabitan itu. Si tertuduh berhujah bahawa laporan pegawai kastam ('ekshibit itu') yang telah memeriksa barang itu dan mengira duti telah salah diterima. Beliau selanjutnya berhujah bahawa tidak terdapat apa-apa keterangan untuk menyokong nilai barang itu seperti yang dikatakan di dalam pertuduhan itu dan bahawa anggapan bilangan barang itu dalam s 120 Akta Kastam 1967 ('Akta itu') tidak digunakan.
C Pihak pendakwa merayu terhadap hukuman yang dijatuhkan.

Diputuskan, menolak rayuan-rayuan itu:

(1) Pemeriksaan barang itu telah dijalankan oleh PW10 yang sendiri telah menyediakan ekshibit itu yang sedang dibincangkan. Penulis
D ekshibit itu telah dibuktikan dan dokumen itu boleh diterima.

(2) Intipati pertuduhan itu adalah berat barang itu. Kesalahan itu telah dilakukan apabila butir-butir itu dibuktikan salah diakui. Keterangan yang tidak dapat dipertikaikan telah dikemukakan membuktikan bahawa berat barang itu seperti yang diakui adalah salah.

E (3) Untuk menggunakan anggapan di bawah s 120 Akta itu, adalah mencukupi untuk memeriksa dan jika perlu menguji kandungan hanya 10% setiap jenis bungkusan atau bekas yang mengandungi barang itu. Dalam konteks kes sekarang ini, frasa 'each description of package or receptacle' adalah satu karton. Keterangan
F yang dikemukakan menunjukkan bahawa terdapat 1,000 karton, kesemuanya berupa perkemasan biasa. Keterangan menunjukkan bahawa pegawai kastam telah menguji keseluruhan kandungan 12 karton dan bukan hanya kandungan 10% bagi setiap 12 karton itu. Jelas bahawa keperluan yang dikehendaki untuk mengunakan anggapan di bawah s 120 Akta itu telah dipatuhi.

G (4) Pada fakta dan keadaan begitu, mahkamah tidak boleh memutuskan yang majistret perbicaraan telah salah menggunakan budi bicaranya dalam menjatuhkan hukuman ke atas si tertuduh.]

Case referred to

H 1 *Au Ah Lin v PP* [1963] MLJ 365 (folld)

Legislation referred to

Customs Act 1967 ss 120, 133(1)(a)
Criminal Procedure Code (FMS Cap 6) s 294

I *Lai Peng Seng* (*Sim Thong Poh* with him) (*Tan & Lai Advocates*) for the appellant.

Nik Suhaimi (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Chong Siew Fai J: The accused was found guilty and convicted of the offence of signing a customs import declaration containing incorrect particulars in that the declaration stated 21 tons of unglazed mosaic flooring tiles ('the goods') valued at $21,805.22 when in fact there were 29.7 tons valued at $30,838.81, an offence under s 133(1)(a) of the Customs Act 1967. There was no dispute that the goods were contained in 1,000 cartons. The accused was ordered to be released on bond of good behaviour for a period of one year from the date of sentencing (29 April 1989) in the sum of $1,000 with one surety. The goods were forfeited.

Against the conviction, the sentence and the forfeiture order, the accused appealed. The prosecution also appealed against the sentence imposed.

At the hearing of the appeal Mr Lai for the accused abandoned the appeal against the sentence.

Accused's appeal

For the accused it was contended that exh P9 was inadmissible. Exhibit P9 recorded the results of the examinations of the entries in the import declaration and related documents and of the goods ie the quantity, amounts of duty, surtax, customs duty etc. The examinations were carried out by PW10 Yunus Ghani and he himself prepared exh P9. The authorship was proved. I fail to see how it is inadmissible. The contention fails.

One of the grounds of appeal stated that 'the evidence adduced as a whole does not support the ingredients of the offence charged'. At the hearing counsel for the accused said that by 'the ingredients' he meant the value of the goods which was stated in the charge to be $30,838.81, and he submitted that there was no basis for this sum to have come about.

The charge is one of signing an import declaration containing incorrect particulars. It is clear that the essence of the charge was the weight of the goods ie 29.7 tons instead of 21 tons as declared. The offence is committed upon proof of particulars being incorrectly declared. The evidence adduced conclusively proved that the weight as declared was incorrect. As to the value of the goods $30,838.81, the notes of evidence shows that PW10 did explain exh P9 and he was not cross-examined at all about the basis upon which the assessed value of the goods was arrived at. Likewise in the submission of the then advocate for the accused, the stress was on the weight, and nothing was said about the basis for the valuation of the goods. On the other hand, exh P9 shows that duty was payable according to the weight of the goods. (See the column 'Rate of Duty' in exh P9 under which it was stated '50 sen p/kg'.) This ground of appeal has no merit.

The final submission for the accused to be dealt with is on the application of presumption under s 120 of the Customs Act 1967.

The said s 120 enacts:

> When any goods suspected of being prohibited or uncustomed or otherwise liable to seizure have been seized, it shall be sufficient to open, examine, and if necessary test the contents of ten per centum only of each description of package or receptacle in which such goods are contained and the court shall presume that

A goods contained in the unopened package or receptacles are of the same nature, quantity and quality as those found in the similar packages or receptacles which have been opened.

It is a matter of construction of the section. To invoke the presumption that the goods in the unopened packages or receptacles are of the same nature, B quantity and quality as those in the similar packages or receptacles that have been opened, it is sufficient to examine and if necessary test the contents of 10% only of *each description of package or receptacle* in which the goods are contained.

In *Au Ah Lin v PP*,[1] on a construction of s 61 of the Excise Act 1961 which is almost wholly similar to s 120 of the Customs Act 1967, Thomson C LP said (at p 366):

> In our view s 61 does not require that samples be taken of the contents of every package or container which is in question. The samples shall be 10% of the packages or containers and when that is done the presumption mentioned in the section as to the contents of all the packages arises. In our view the section does D not require the taking of any particular quantity. That is abundantly clear on the reading of the section itself. The words 'ten per centum' refer to the packages, not to the contents of each package.

In the context of our present case, the phrase 'each description of package or receptacle' was, in my view, a carton. It must also be noted that the E incorrect particulars alleged were the *weight* of the goods and consequently the *value* thereof. The evidence adduced shows that there were 1,000 cartons, all of standard packing. The testimonies of PW6 Pik Amat and PW7 John Nawang established that they weighed two cartons each of which was 29.7kg net, and that of PW10 Yunus Ghani established that he examined the goods and weighed ten cartons thereof each of which was 29.7kg F net. The evidence shows that these witnesses had tested the whole contents of the 12 cartons and not just the contents of 10% of each of the 12 cartons. It is, in my opinion, clear that the requirement needed to invoke the presumption under s 120 of the Customs Act had been complied with. The presumption was to some degree strengthened by the evidence that the weight 29.7 tons was derived by multiplying 29.7kg (net weight of a carton) G by 1,000 cartons which, as stated earlier, had been established to be of standard packing. The submission therefore fails.

I find no merit in the appeal against conviction.

Since the appeal against conviction fails, the appeal against the forfeiture order, as conceded by Mr Lai, cannot stand.

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Prosecution's appeal against the sentence

I now come to the appeal against sentence by the prosecution. A feature in this case is that originally another person was prosecuted together with the accused in the lower court. That person was charged with the offence of I fraudulently altering the import declaration. He was discharged and acquitted at the close of the case for the prosecution on the ground that no fraud had been proved. The undisputed evidence shows that that person altered the import papers in front of a customs officer after the examination of the

goods which revealed the weight to be 29.7 tons. The learned trial magistrate seemed to have come to the conclusion that the alteration was to correct a mistake in good faith. In her judgment she said:

> Other than that evidence there is not a shred of proof that the second accused made the alteration with any other intention but good faith to correct a mistake discovered during examination.

She was entitled to come to that conclusion. It also appears reasonably obvious that that conclusion was a factor influencing her to exercise the discretion to invoke s 294 of the Criminal Procedure Code (FMS Cap 6). On the facts and circumstances, I am unable to say that the discretion had been wrongly exercised.

The appeal of the prosecution against sentence is also dismissed.

The result is that the appeals by both the accused and the prosecution are dismissed. The conviction, the sentence and the forfeiture order of the magistrate's court are affirmed.

Appeals dismissed.

Reported by Mathavan Devadas